***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

74-2149

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2149

Connecticut Transportation Coalition, State of Connecticut National Association for the Advancement of Colored People Conference of Branches, Connecticut River Ecology Action Corporation, and Charlotte Kitowski, Thomas Sharpless, Ben Andrews for themselves and all others similarly situated

vs.

Thomas J. Meskill, Governor of the State of Connecticut, Joseph Burns, Commissioner of the Department of Transportation of the State of Connecticut, and Nathan Agostinelli, Comptroller of the State of Connecticut

# BRIEF OF THE APPELLANTS

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court improperly denied the Appellants' Motion for Injunctive Relief and improperly dismissed the Appellants' cause of action?

2. Whether this cause of action is one that arises under the laws of Congress and more particularly under that section of the Federal Highway Act of 1970 which is codified as Title 23 USC § 109(h)?

3. Whether this cause of action is one which arises under the laws of Congress and more particularly under the Clean Air Act Amendments of 1970?

## PRELIMINARY STATEMENT

This is an appeal from an unreported decision rendered on July 23, 1974 by Judge T. Emmet Clarie of the District of Connecticut.

## STATEMENT OF THE CASE

This is an appeal from a final judgment of the District Court of Connecticut dismissing a cause of action seeking to enjoin the Defendants from continuing to build and/or continuing to build from monies dedicated for mass transportation, an experimental People Mover project at Bradley International Airport.

The Plaintiffs are individuals and organizations dedicated to sound ecological determinations and rational mass transportation planning. The Defendants are officials of the State of Connecticut against whom, if one were granted, an effective injunction would lie to halt the construction of and/or the payment for this controversial project.

One July 23, 1974, Judge Clarie, in a memorandum of decision, ruled that there was no federal jurisdiction for this cause of action and furthermore that the Court would decline to exercise pendant jurisdiction over the state law claims. From this decision, the Plaintiffs appealed.

## ARGUMENT

I. The Defendants have obligated themselves, pursuant to Title 23 USC § 109 (h) to comply with Executive Order 16. Executive Order 16 requires the preparation of an Environmental Impact Statement on state funded projects of the Connecticut Department of Transportation. The Defendants have failed to comply with Executive Order 16 and their obligation to do so can be enforced by the Plaintiffs in the Federal Courts.

In 1970, in the National Environmental Policy Act, Congress declared a national policy to encourage harmony between man and his environment and to promote efforts

to eliminate damage to our environment. Later that year, Congress, in the Federal Highway Act of 1970, added subparagraph (h) to Title 23 U.S.C. §109. Under that new subparagraph, the Secretary of the Department of Transportation was required to promulgate guidelines to assure against adverse economic, social and environmental effects on any project on any federal-aid system. In furthering that national policy, the secretary promulgated Policy and Procedure Memorandum 90-4 (Plaintiffs' Exhibit 8, Resource Manual, Reference f) which required each state highway agency to develop an action plan which would indicate the "procedures to be followed in developing highway projects" (Ibid. Paragraph 8) to "assure that adequate consideration is given to possible social, economic and environmental effects. . ." (Ibid. Paragraph 1)

Pursuant to that PPM, the State of Connecticut prepared and submitted PACER which, pursuant to Paragraph 6 f of PPM 90-4, was approved on October 5, 1973 by Governor Meskill of Connecticut and William White, the Regional Federal Highway Administrator.

Former Acting Commissioner Shurgrue testified that Connecticut's continued federal funding for Department of Transportation projects depended upon the submission of an acceptable action plan by the State of Connecticut (Tr. p. 128,9). In the plan submitted by Connecticut, extensive mention was made of Executive Order 16, which on its face, applied solely to state funded, non-federal projects.

It is identified in the glossary: "Executive Order No. 16-A Governor's executive order issued in 1972 setting forth a policy for State agencies to address environmental concerns when proposing projects involving solely or partial state funds." (Plaintiffs' Exhibit 8a, Policy Manual, p. iv)

It is listed twice as one of the plan's highlights and/or innovations in the summary; first as an action to be taken to improve consideration of alternatives:

> The Department will continue to assess alternatives throughout the planning and design process using NEPA requirements and Governor's Executive Order #16 as formal forums." (Ibid. p. 4)

and then as an action to improve the decision making process.

> A State Planning Council composed of Commissioners representative and attentive to Connecticut societal needs and concerns is available to oversee Department decisions. Further instruments such as the NEPA and the Governor's Executive Order #16 are influences on Department decision making (Ibid. p. 5)

It is described at length as one of the state's directions in the field of environmental awareness in the Chapter on Existing Environmental Legislation and Policy.

> Governor's Executive Order #16 - Previous mention has been made of federal acts requiring disclosure of the advantages and disadvantages of proposed actions that would have significant effect on the environment. A gap in this analysis procedure were projects and programs that did not have infusion of federal funds. Therefore, for solely state funded actions which may significantly affect the environment, Governor's Executive Order No. 16 was issued. This order and its implementation guidelines are presented in PACER Resource Manual Reference No. 6. The order and guidelines call on state agencies contemplating major actions which may significantly affect the environment to formally document the reasons for, alternatives to, and the attendant effects of, the action under consideration. The environmental statement then is evaluated and commented upon by other State agencies. Subsequently it is reviewed by the State Planning Council and a recommendation is made to the Governor to pursue, defer, modify, or cancel the proposal. (Ibid. p. 22)

Again it is referred to as one of the tools to be utilized by the State to evidence its concern for minorities during transportation planning:

> In Section 2.4, ıe Environmental Section with the advice of the Department's Equal Employment Opportunity Coordinator and the Commissioner of Human Rights and Opportunities will review environmental statements prepared in response to NEPA or Governor's Executive Order #16 with the view of effects on minorities. (Ibid. p. 64)

Then it is referred to as one of the mechanisms for improving public involvement in policy decision making:

> The Connecticut Department of Transportation maintains a freedom of information policy. The NEPA provisions and Governor's Executive Order No. 16 have strengthened this policy by providing as an integral part of the environmental statement letters, reports, and memoranda concerning a transportation project thereby facilitation their review by the public. (Ibid. p. 76)

And finally it is set out in full as PACER Manual Reference No. 6 (Plaintiffs' Exhibit 8 b).

Executive Order 16 was advertised by the State of Connecticut and was, in fact, a part of the action plan it submitted and had approved pursuant to U. S. Department of Transportation's PPM 90-4.

Governor Meskill had issued Executive Order No. 16 on October 7, 1972 in order to assist in conserving, improving, protecting and managing the natural and basic resources of air, land and water in the State of Connecticut.

Under Paragraph 1 of that Executive Order, each state agency was required to review its policies and practices in order to insure that they were consistent with the legislature's statement of environmental policy.

> The general assembly finds that the growing population and expanding economy of the state have had a profound impact on the life-sustaining natural environment. The air, water land and other natural resources taken for granted since the settlement of the state, are now recognized as finite and precious. It is now understood that human activity must be guided by and in harmony with the system of relationships among the elements of nature. Therefore the general assembly hereby declares that the policy of the State of Connecticut is to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the policy of the state to improve and coordinate the environmental plans, functions, powers and programs of

> the state, in cooperation with the federal government, regions, local governments, other public and private organizations and concerned individuals, and to manage the basic resources of air, land and water to the end that the state may fulfill its responsibility as trustee of the environment for present and future generations. Title 22 (a) CGS §1

Moreover each agency, whenever it was considering or taking action which might significantly affect the environment, was required to make a written evaluation of the consequences of that action on the environment, of the impact of that action on ecological systems, of the adverse environmental effects of that action, and of alternatives to the proposed action (Plaintiffs' Exhibit 7, paragraph 2).

Such an evaluation had to include a short term and long term cost/benefit analysis (Plaintiffs' Exhibit 7, paragraph 3) and had to be prepared for any state funded project which could have a major impact on the state's land, water, air or other environmental resources or which could serve short term, to the disadvantage of the long term, environmental goals. (Plaintiffs' Exhibit 7, paragraphs 4 and 5).

The evaluations were to be in accordance with "guidelines to be promulgated by the governor" (Exhibit 7, paragraph 6) and they were to be submitted for review and comment to the Connecticut Council on Environmental Quality, the Department of Environmental Protection and any other agency the guidelines required. Comments were to be forwarded to the State Planning Council. (Exhibit 7, paragraph 7).

The State Planning Council had to review the evaluations and comments and had to make written recommendations to the Governor regarding the proposed action. (Exhibit 7, paragraph 8).

The executive order was to "take effect immediately." (Exhibit 7, paragraph 9).

There is no question that this comprehensive environmental planning and review mechanism was never enforced and that it existed only on paper. The Defendants contended that Executive Order No. 16 was merely a meaningless document. They claimed that because the Governor never promulgated guidelines for the agencies to prepare their evaluations "in accordance with" that Executive Order 16 did not exist. Whatever the merits of the Defendants' legal position may have been, their position was not factually required.

Both former Acting Commissioner Shugrue of the Department of Transportation and Dr. Dowd, Director of Planning and Research of the Department of Environmental Protection testified that environmental evaluations considering the items enumerated in Paragraph 2 of Executive Order 16 could have been prepared without guidelines (Tr. p. 121-2 and p. 356 ). They testified that guidelines would not have been required to write an evaluation of the consequences of a proposed project on the environment considering its impact on ecological systems, its possible adverse environmental effect and considering alternative courses of action.

This testimony was not at all surprising in light of the fact that PACER (Plan of Action for Connecticut's Environmental Responsibility) is nothing more than a 135-page primer prepared by the Department of Transportation on how to assess, evaluate, study and address environmental effects. While the compilation of PACER was required in order to satisfy Federal standards, PACER itself is "a plan which augments and reinforces federal and state legislation and adopted

policies and procedures. . . [It] sets out procedures to upgrade the Connecticut Department of Transportation abilities in the areas of environmental effect consciousness and expertise (systemic interdisciplinary approach) so that the aforementioned goals [of meaningful involvement, discussion of beneficial and adverse effects, and study of alternatives] can be addressed and assessed intelligently and objectively." (Plaintiffs' Exhibit 8a, Policy Manual, p. 2)

In order to accomplish that end PACER spends 25 pages discussing how the Department can improve its mechanism for identifying environmental effects.[1] (Ibid. pp. 24-68) In fact, PACER indicates that the Departm ent of Transporation has created for that very purpose a Programming Concept Team (Ibid. p. 38) which will monitor the follow ing kinds of short and long term environm ental effects:

> The short term effects that Transportation project assessments would include the following but not be limited to:
>
> 1. Degradation of water quality.
> 2. Assessment of soil erosion effects.
> 3. Comparison of pollutant emissions over time taking into consideration vehicle mix and model retirement predictions.
> 4. Effects on mobility of fire and emergency equipment.
> 5. Comparisons of predicted noise levels to experienced noise levels. Attenuation predict of berms, walls, and depressed alignment to be included in this investigation.
> 6. Recovery of flora and fauna after disturbance during construction period.

1. The Plaintiffs accept the definition of the word "environment" found in PACER at page iii which is that the environment is "the aggregate of social, natural and cultural conditions that influence of the life of the individual and the community.

7. Effect on realization or nonrealization of joint use and multiple use opportunities.
8. Success of achieving aesthetic treatments, vistas and harmonic balance of the transportation facility with surrounding area.
9. Investigation of the replacement housing and business facilities immediate effects on the people and groups in proximity to the transportation corridor.
10. Recovery of desired community services (after construction) - examples: school bus routings, truck routings.
11. Study of the facility's effect on the conduct and financing of government. The time to recover property tax revenues lost because of the facility land taking would be one of the questions addressed.

The long term effects requiring analysis are interlaced with other developments, policy and change of policy with modifications in government. Nevertheless, to the extent determinable, the following long term effects will be considered:

1. Beneficial and adverse changes in residential neighborhood character in the environs of the transporation facility.
2. Consistency with local, regional, state and federal plans for development, land use, safety, mobility and conservation of resources.
3. Economic consequences of the facility to the user, the intercepted host municipalities and to the State in terms of costs and benefits. Attracted industry, new employment associated job productivity, income gains, requirements for housing and public services would be elements of such a macro input-output analysis.
4. Any irreversible or irretrievable committment of resources.

Moreover, PACER also spends 16 pages (Ibid. pp. 59-74) explaining how the Department of Transportation can and will improve its consideration of alternatives, including the "no build" alternative and another 16 pages (Ibid. pp. 99-105) explaining how it can achieve "proper and continuing social, economic and environmental discipline input" (Ibid. p. 91)

Therefore the Defendants could never have, and did not, contend that they were unable to evaluate this or any project's environmental consequences. They contended solely that they did not so evaluate this project because they

believed that Executive Order 16 was not in effect and would not be in effect until its guidelines were promulgated by the Governor. The Plaintiffs contended that Executive Order 16 was in force and that the Defendants' failure to comply with its provisions was unlawful.

Executive Orders have been issued by all chief executives since George Washington. Comment, Executive Order and the Development of Presidential Powers, 17 Vilanova Law Review 688, (1972). The Federal Register Act of 1935 brought for the first time, an orderly procedure for the issuing, publishing and compiling of presidential executive orders. Ibid. No such procedure exists in the State of Connecticut. The growing importance of Executivé Orders can be judged by the tremendous influence in the civil rights area of President Johnson's Executive Order 11246 requiring affirmative action, non-discriminatory hiring plans on all federal contracts.

The President or any Governor in the exercise of the executive powers vested in them by the various constitutions may make executive orders. These executive orders are regarded as public acts and courts have historically taken notice of executive orders and given them effect. 54 Am Jr. United States §37.

Executive orders are to be accorded the same force and effect as statutes. Farkus v. Texas Inst. Inc., 375 F. 2d 629 (Ca. Texas, 1967), Southern Illinois Builders Assoc. v. Ogilvie, 327 F. Supp. 1154 affirmed 471 F. 2d 680 (DCIll. 1972) Since they are treated like statutes, rules of statutory construction will be applied to them. Feliciano v. U.S., 297 F. Supp. 1356 affirmed 422 F. 2nd 943 Cert. Den. 91 S. Ct. 44, 400 U.S. 823, 27 L. Ed. 2d 51 (DC Puerto Rico, 1969)

In Connecticut, as throughout the land, a statute may contain its own effective date. Title 2, Connecticut General Statutes §32. The effective date therefore of Executive 16 was, by its terms, October 4, 1972. However, since no guidelines were ever promulgated by the governor, paragraph 6 of the Executive Order 16

(evaluations. . .shall be accordance with guidelines. . .) could not take immediate or, in fact, delayed effect. However, different parts of the same statute may take effect at different times. 2 Southerland Statutory Construction §33.08. An act may take effect from the date of passage although a contingency may postpone the effect of some sections of the act. U.S. v. Chong Sam 47 F. 878 (DC E.D. Mich. 1891)

In the Chong Sam case the court found that Section 13, the appeal section, of the last of the Chinese Exclusion Acts took effect prior to the exchange of treaty ratifications despite the fact that §1 of that Act read

> That from and after the date of the exchange of ratifications of the pending treaty between the United States of America and His Imperial Majesty, the Emperor of China, signed on the 12th day of March, Anno Domino One Thousand Eight Hundred and Eighty-Eight, it shall be unlawful for a Chinese person, whether a subject of China or any other power to enter the United States, except as hereinafter provided.

In reaching its result, the Court said " But this by no means qualified the remainder of the statute. To give that effect to the restraining words of Section 1 is to disregard entirely the peremptory language of Section 5 'from and after the passage of the Act.' and its cognate sections relative to the return here of Chinese laborers, and to insert in absolute enactments qualifications and restraints not derivable from their terms. Beyond this, that interpretation would subordinate the very end and aim of the Act. . .to the contingent operation of this secondary provision, which is but one of the aids to the end to be accomplished." Ibid. p. 881

With regard to Executive Order 16, the guidelines which were to have been promulgated were similarly merely an aid to the implementation of the governor's attempt to conserve, manage and protect the natural resources of the State of Connecticut; goals which were consistent with the legislature's extremely strong declaration of public policy. Therefore, as a matter of public policy, statutory construction, and its own clear language, Executive Order 16, except for paragraph 6, went into effect on October 4, 1972 and should have been followed ever since.

If we are to live under a government of laws and not of men, enactments, both legislative and executive, must not be meaningless.

The Plaintiffs readily admit that there is nothing in Title 23 U.S.C. §109(h) or PPM 90-4 which would have required the inclusion of Executive Order 16 in PACER. That is no longer, and never was, the issue. The issue is have the Defendants by voluntarily electing to incorporate Executive Order 16 into their action plan obligated themselves to follow it. The Plaintiffs claim that since the Defendants agreed to utilize Executive Order 16, as well as all of the other procedures contained in their action plan, in exchange for assured eligibility for federal funding, that the State of Connecticut has become obligated to prepare environmental statements on state projects by virtue of its agreement with Federal Highway Administrator.

The Plaintiffs' right to bring suit for the Defendants' failure to fulfill that obligation to the federal government should be as great as their right to bring suit for the failure of the proper officials to prepare environmental impact statements pursuant to Title 43 U.S.C. §4332 (2)(C) (NEPA). Cases throughout the country, including The Committee to Stop Route 7 v. Volpe, 346 F. Supp. 731 (DC Conn. 1972) in the District of Connecticut, have recognized that the strong national policy in favor of a safe and healthful environment is clearly sufficient to bestow a right to suit to qualified members of the public under 28 U.S.C. §1331.

The very same strong national policy in favor of safe environment which lead to the passage of NEPA lead to the passage of §136(b) of the Federal Highway Act of 1970 (Title 23 U.S.C. §109(h) ). 1970 U.S. Code Congressional and Administrative News, pp. 5394, 5475. In light of that strong national policy which has lead the courts to recognize judicially enforceable duties under NEPA, the Plaintiffs ask this court to recognize that similar duties under the Federal Highway Act of 1970. The Plaintiffs are mindful that not every claim "arising

under the laws of Congress" qualifies for federal jurisdiction, but they assert that they are raising substantial federal questions regarding the enforcement of agreements entered into pursuant to Title 23 U.S.C. §109(h) and moreover that the actions of the Defendants have created in the Plaintiffs an enforceable right arising under federal law.

II. Federal jurisdiction for this cause of action exists under 42 U.S.C. §1857h-2(a) or under 28 U.S.C. §1331. The Defendants' failure to consider the effect of this project on the State's ability to comply with the requirements of the Clean Air Act is a violation of law made possible only by the State's failure to have filed an acceptable implementation plan.

The Plaintiffs have also brought this action in federal court pursuant to the citizens suit provisions of the Clean Air Amendments of 1970, Title 42 U.S.C. §1857 h-2. The Plaintiffs allege that the Defendants' actions in proceeding with this project are in violation of the ambient air standards for automobile pollutants established by the Administrator of the Environmental Protection Agency pursuant to Title 42 U.S.C. §1857 c-4.

Dr. Richard Dowd, the Director of Planning and Research for the Department of Environmental Protection of the State of Connecticut testified:

1. That pursuant to the Clean Air Act, the Administrator of the Environmental Protection Agency was required to set national standards for ambient air quality. (Tr. p. 323 ).

2. That pursuant to that Act, and Title 42 U.S.C. §1857 c-4 specifically, that the Administrator set such standards for, among other things, four types of pollutants generated almost exlusively by automobiles. (Tr. p. 324 ).

3. That, having set such standards, the Administrator required, pursuant to Title 42, §1857 c-5, that the State of Connecticut and all other states submit implementation plans providing for the attainment of such health standards by the year 1975. (Tr. p. 326 ).

4. That the State of Connecticut submitted an accepted implementation plan which indicated that it did not need to take any affirmative action order to attain the national standards for automobile caused pollutants. (Tr. p. 330 ).

5. That, based on later testing, the State's plan was found to be inadequate with regard to the automobile associated pollutants.(Tr. p. 333 ).

6. That on August 17, 1973, the Environmental Protection Agency informed Governor Meskill by letter (Plaintiffs' Exhibit 16) that the state implementation plan would have to be amended to include traffic strategies. (Tr. p.343-4 ).

7. That traffic strategies are any and all methods other than straight emission controls for reducing automobile emissions.(Tr. p. 327 ).

8. That the states had no right or power to regulate emission controls because Congress had pre-empted that field. (Tr. p. 333 ).

9. That the State of Connecticut was given until January 1, 1974 to revise its state implementation plan and that that date has subsequently been extended. (Tr. p. 329 ).

10. That based upon the new test results, the State of Connecticut will have to reduce automobile emissions, and therefore automobile traffic, by 94% in the Hartford area if it is to achieve the national ambient air standards by 1975. (Tr. p. 341 ).

11. That the Hartford area includes Hartford County, Bradley International Airport and extends as far north as the Massachusetts boundary. (Tr. p. 334 ).

12. That the State might and probably would receive an extension once its implementation plan was filed and that it therefore would not be required to attain the national ambient air standards until 1977. (Tr. p. 340 ).

13. That if such an extension were granted by the Environmental Protection Agency to the State of Connecticut the implementation plan would still have

to provide for transportation strategies that would reduce automobile emissions by 20 to 50 percent. (Tr. p. 343 ).

Dr. Dowd also testified that in order to regulate the spread of automobile emissions that other state and federal regulations would in the near future make the licensing of new parking lots mandatory. (Tr. p.350-1).

It is within this framework and at a time when it knew of the magnitude of the traffic strategies that it would have to implement, that on November 15, 1973, the State of Connecticut decided to proceed with the experimental demonstration project designed to serve a to-be-built parking lot at Bradley International Airport. The Defendants, without even stopping to consider the changed conditions brought about by the August 17 letter, decided to proceed with this project despite the fact that some of its obvious effects will be to allow, if not to mandate, the building of a substantial 1500 car parking lot at the airport and to encourage automobile traffic in the Hartford area to the airport in order that citizens throughout the state will be able to obtain the project's demonstration benefits.

The issue in this case then is whether it is possible that the State's failure or refusal to consider the effect of such action on its ability to comply with the requirements of the Clean Air Act, a failure which so clearly violates the spirit of that law, can possibly be legal? The Clean Air Act sets forth a strong Congressional policy to protect the nation's air resources. The Act's very stringent substantive and time requirements have let to substantial litigation. The case of Riverside v. Ruckelshaus, 4 ERC 1728 (D.C. Cal. 1972), in which a mandamus was issued on the Administrator of the Environmental Protection Agency requiring him to prepare an implementation plan for the State of California, sets forth in a succinct fashion the time requirements of the Act.

> 12. The Clean Air Act establishes firm deadlines for actions to be taken by a state and by the Administrator in furtherance of the goal of clean air.

(a) Within 30 days after December 31, 1970, the Administrator of EPA was required to publish proposed regulations prescribing national primary and secondary ambient air quality standards for each pollutant for which air quality criteria had been issued. On January 31, 1971 air quality criteria had been issued for carbon monoxide, sulfur dioxide, nitrogen oxides, particulates and photochemical oxidants.

(b) Within 90 days after publication of the proposed regulations, the Administrator of EPA was required to promulgate by regulation the proposed primary and secondary air quality standards, "with such modifications as he deems appropriate." 42 U.S.C. §1857 c-4(a) (1) (B).

(c) Within nine months after promulgation of the standards, each state was required to submit to the Administrator of EPA an implementation plan providing for achieving the national primary air quality standards in each air quality region. 42 U.S.C. §1857 c-5(a) (1).

(d) Within four months after the date of submission of such an implementation plan, the Administrator was required to approve or disapprove it. 42 U.S.C. §1857 c-5(a) (2).

(e) The Administrator was entitled to approve a state implementation plan only if he found that it provided for the achievement of national primary ambient air quality standards "as expeditiously as possible, and in no case later than three years from the date of approval of such plan." In order to meet the statutory target date, the state plans were required to include emissions limitations, schedules and timetables for compliance, and "such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land use and transportation controls." 42 U.S.C. §1857 c-5(a) (2) (B).

(f) Section 110(c) of the Clean Air Act, 42 U.S.C. §1857 c-5(c), provides in pertinent part as follows:

"The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if --

. . .

(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section,

> The Administrator shall, within six months after the date required for submission of such plan. . ., promulgate any such regulations unless, prior to such promulgations such State has adopted a plan. . .which the Administrator determines to be in accordance with the requirements of this section." Ibid. at p. 1730.

In large part because of the extraordinarily poor quality of the nation's air, many states have felt that it would be impossible for them to comply with the clean air standards within the time provided by law. The Administrator of the Environmental Protection Agency, therefore, began to issue extensions of time to the various states for the filing of their implementations plans. These extensions were struck down in the strongly worded decision and order in Natural Resources Defense Council v. EPA, 4 ERC 1945 (CA, Dis. Col., 1973) the seminal case under the Clean Air Act.

> [1] Turning to the merits, we find that the Administrator acted in the best of faith in attemptin to comply with the difficult responsibilities imposed on him by the Congress. Nevertheless, he did not conform to the strict requirements of the Clean Air Act of 1970 in permitting several states to delay submission of transportation control portions of their implementation plans until February 15, 1973, and in granting extensions until mid-1977 for attainment of the national primary ambient air standard without following the procedures established in Section 110(3), 42 U.S.C. §1857 c-5(e). The combined effect of these unlawful actions has been to interfere with the congressional purpose of attaining clean air by a date certain, May 31, 1975, subject only to certain limited and well defined statutory extensions. The Act plainly does not permit extensions of the statutory time for submission by each state of an implementation plan which will permit attainment of the standards by 1975. Whether or not the technology for implementation of or compliance with the plan is available is a matter for the grant of extensions under Section 110(e) and (f) after the plan is filed.
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> In order to remedy these violations of the Act, the Administrator and the states must return to the procedures and the timetable established by the Congress.
>
> Accordingly, it is ORDERED by this court that:
>
> (1) The Administrator shall formally rescind, through notice to the states and through publication in the Federal Register, the February 15, 1973 extension granted to several states to submit the transportation control portions of their implementation plans.

(2) The Administrator shall formally rescind, through notice to the states and through publication in the Federal Register, the extension granted to several states to delay implementation of their plans or portions thereof until May 31, 1977.

[2](3) The Administrator shall inform all states concerned, by direct notice and through publication in the Federal Register, that all states which have not yet submitted an implementation plan fully complying with the requirements of the Clean Air Act of 1970 must submit such a plan by April 15, 1973. That plan must satisfy each and every requirement of Sections 110(a)(2)(A) through (H) if it is to be approved by the Administrator. In particular, it must provide for the attainment of the primary standard as expeditiously as practicable but in no case later than May 31, 1975, and it must include "emission limitations, schedules, and timetables for compliance with such limitations and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land use and transportation controls.
Ibid at p. 1946.

In addition to stringent time requirements, the federal courts have held that the Administrator has a rather unusual duty. In addition to seeing that the national standards are not exceeded in any geographical area, the Administrator must also insure that whatever good air we have, wherever it exists, shall not be degradated. In Sierra Club v. Ruckelshaus, 4 ERC 1205, (D.C. Dis. of Col. 1972) affirmed 4 ERC 1815 (C.A. 1972) affirmed 5 ERC 1417 (S. CT., 1973), the court granted a temporary injunction against the Administrator who was on the verge of approving state implementation plans which would have allowed for deterioration of existing clean air levels on the grounds that he believed that he lacked the power to act otherwise. In granting the injunction the court concluded:

Having considered the stated purpose of the Clean Air Act of 1970, the legislative history of the Act and its predecessor, and the past and present administrative interpretation of the Acts, it is our judgment that the Clean Air Act of 1970 is based in important part on a policy of non-degradation of existing clean air and that 40 C.R.F. § 51.12(b), in permitting the states

to submit plans which allow pollution levels of clean air to rise to the secondary standard level of pollution, is contrary to the legislative policy of the Act and is, therefoe, invalid. Accordingly, we hold that plaintiffs have made out a claim for relief. Ibid. at p. 1207.

This strong congressional policy has led at least one court to sanction, on the theory of abating a nuisance, the use against a commercial concern of administarative proceedings under the Clean Air Act even before the establishment by the Administrator of applicable standards. U.S.V. Bishop, 1 ERC 1004 (D.C. Md., 1968).

Despite the intent of Congress to insure that national ambient air quality standards will be achieved by mid 1975 and to insure that fact by requiring all states to submit implementation plans by early 1972, a serious snag has developed; a snag caused in large part by the bifurcated split of federal/state authority contained in the 1970 amendments. The reasons for this split were delineated in Duquesne Light v. EPA, 5 ERC 1473 (CA, erd Cir, 1973).

> In enacting the Clean Air Act Amendments of 1970, Congress attempted to foster a symbiosis between two perceived needs. First Congress wanted to preserve the basic state and local control of the design and enforcement of air pollution regulations. Besides a deference to the states, such a state role permitted more awareness of individual and local problems to be considered in formulating pollution abatement plans.
>
> Second, Congress sensed that there was a rising dissatisfaction with the results being attained by the states, operating under the then existing legislation. Therefore, there was a desire for federal standards and enforcement. Further, Congress, apprised of the public concern, manifested its insistence on expedition in cleaning the air.
>
> The result of these two conflicting strains was thatCongress, in the 1970 Amendments, devised a system in which certain aspects of the pollution control effort were assigned exclusively to the EPA, other aspects being entrusted to the states under federal supervision. Ibid. at p. 1474.

As in the instant case, problems have arisen where, because of the bi-level division of authority, there is a period of time after late July 1972 when no

implementation plan is in effect. THis was not supposed to have been possible under the 1970 amendments. However, it occurred in Connecticut because the originally accepted implementation plan was approved due to a mistaken belief on the part of the State and the Federal Government that no affirmative action against automotive pollutants was needed in the State of Connecticut. It was not until August of 1973, that the federal government advised Connecticut that its previously accepted non-plan was inadequate; seriously inadequate as Dr. Dowd testified, and so seriously defective that, as Dr. Sharpless testified, there were absolutely no air resources left in the Hartford area. (Tr. p. 388 ).

While the Environmental Protection Agency's action in August of 1973 was tantamount to a rejection of Connecticut's plan as far as automobile pollutants were concerned, neither theState nor the Administrator was under the same type of severe legislatively imposed time limits to prepare a new plan as they had been under the time limits contained in Title 42 U.S.C. §1857 c-5(c) for dealing with approval/rejection of initial submissions. Therefore despite the intent of Congress that every state was to have an accepted implementation plan by 1972, Connecticut does not now have such a plan and has never had such a plan. To make matters worse, based on the testimony of Drs. Dowd and Sharpless, Connecticut can ill afford to be in this position since with no air resources and in need of traffic reductions of incredible proportions, Connecticut is a clean air disaster area.

To the best of the Plaintiffs' knowledge, only two courts have been faced with a similar situation. In Citizens Association v. Washington, 6 ERC 1169 (DC 1974), the Plaintiffs were trying to enjoin construction of two mammoth apartment complexes containing parking lots. Permits for their construction had been awarded during the period when the district was without any implementation plan. Washington had submitted a plan which ahd been mistakenly accepted and which

was in effect in mid-1972. Approval of that plan was withdrawn by the Administrator on May 17, 1973. The District was then given to August 15, 1973 to submit a new plan. It failed t do so and the Environmental Protection Agency promulgated a partial plan with transportation control strategies on November 15, 1973. This partial plan included a requirement for "pre-ccnstruction review of parking facilities of more than 250 spaces." During the 6-month hiatus when Washington had absolutely no plan, the owners of the apartment complex in question, which would have been covered by the new regulations, obtained building permits and began construction.

The Court first faced the problem of whether, in the absence of an implementation plan, it had jurisdiction under the citizens suit provisions of the Clean Air Act. It decided that it did not have such jurisdiction but instead it had jurisdiction under 23 U.S.C. §1331. We would ask of this court either to find that it has jurisdiction of this cause of action under the Clean Air Act or adopt the following rationale from the Citizens Association case:

> The Court has determined that jurisdiction does not lie under 42 U.S.C. §1857h-2(a), as that section is limited to an action brought". . .to enforce. . .an emission standard or limitation . . .", and to an action in the nature of mandamus against the Administrator of the Environmental Protection Agency. Since there is no final standard in effect in Washington, D.C. at present, none can be enforced against the Maloney and Inland projects. In addition, the Administrator has not been named as a party-defendant in the present action.
>
> However, the Court is of the opinion that this Court can exercise jurisdiction under 28 U.S.C. 1331, which gives the district courts jurisdiction over a federal question in which the amount in controversy exceeds $10,000. The Court has determined that a substantial federal question exists as to whether the Clean Air Act of 1970 requires that the Maloney and Inland developments be reviewed during their construction to determine their potentiality for interfering with attainment and maintenance of the national standards in Washington, D.C. The Court also has concluded that injury to Plaintiffs' health from the violation of national ambient air standards represents an amount in controversy that exceeds $10,000 exclusive of interest, cost, and attorneys' fees.

Having found jurisdiction, that court denied the Plaintiffs' motion for preliminary relief on the ground that the Administrator had considered the very problem of retroactive application of his control strategies to events which occurred when there was no plan and that he had decided against making any such application. The Court found this decision to be an administrative determination which was entitled to presumption of regularity. It said:

> With respect to such facilities begun, as it were, within the regulatory void, the Administrator commented as follows:
>
> "Although the Administrator believes that he would have had discretion under the Court order (NRDC v EPA, supra) and general principles of administrative law to promulgate a retroactive regulation in these jurisdictions, consideration of equity, in his judgment, tipped the balance against it."
>
> The Court believes the EPA decision as to application of this regulation controlling of the question whether the District of Columbia should be ordered by the Court to conduct an air quality analysis of the Maloney and Inland projects.

A similar result was reached in Movement Against Destruction v. Volpe, 5 ERC 1625 (DC Dist. Maryland, 1973). For reasons that are not enunciated in the opinion, Maryland did not have an implementation plan on May 29, 1973. The Plaintiffs therein were arguing that the Clean Air Act could form a portion of the basis for enjoining construction of a particular highway, in part because the Governor's recently submitted, but still unapproved, implementation plan "proposed reduction of automobile use by 80% in 1975 and by 52% in 1977: Ibid at 1650. The Court, however, because of the lack of notice, did not find the Clean Air Act to be an available jurisdictional basis for the suit. It said:

> Plaintiffs do not contend that an injunction against the construction of I-170 in the F-M corridor should be based directly upon the Clean Air Act. Any such contention would be without merit, since there is no evidence in this case that they have given the requisite notice to the EPA Administrator and others.

In the instant case, parenthetically, notice was not a problem. The Plaintiff, Mrs. Kitowski, testified that on August 15, 1973 she brought the

matter of imminent rejection of the State's implementation plan to the attention of Acting Commissioner Shugrue and discussed with him the effect that the need for transportation strategies would and should have on department planning. (Tr. p. 407 ).

Having discovered that it had lost more than one year in its attempt to achieve the national health standards for air because of an unfortunate mistake of fact, and having learned that new test results indicated the wretched state of air quality in Connecticut, the State could not, and still comply with the Clean Air Amendments of 1970, act as if nothing had happened, and insist on its right to proceed with "business as usual". Whatever anyone may think of the policies inherent in or behind the Clean Air Act, it is the law of the land and Congress could not have intended to allow any citizen or any state to cavalierly circumvent its national purposes.

The trial court, however, found that there was no federal jurisdiction under this set of facts. Its decision was perhaps based, in part, upon a mistaken belief that the steps contained in an action plan would not go into effect until 1977. At page 19 of its ruling, the court stated,

> "Once filed, these proposed transportation control strategies will probably not become effective until 1977."

## CONCLUSION

The Plaintiffs, on appeal, contend that the Defendants' conduct has violated standards required by federal law and that the Plaintiffs, therefore, are entitled to enforce their claims in a federal court. They were aware that the contract involved is a state funded project with no federal monetary or planning input. It is the Plaintiffs' position, however, that states should not be able to agree with

the federal government to implement an action plan to protect the environment and then to fail to abide by that plan without exposing itself to suit. Similarly, it is the Plaintiffs' position that the Defendants should not be able to avoid having to meet the national ambient air standards by the twin expedient of having submitted an incorrect implementation plan and then, thereafter, never submitting a corrected plan.

Respectfully Submitted,

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